

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Sharon Smith McLaurin, et.al.

Plaintiffs

v.

Civil Action No. 4:14-cv-00740

Waffle House, Inc. and
Bandidos Motorcycle Club

Defendants

**MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE
PURSUANT TO F.R.C.P. 41(a)(2) AS TO PLAINTIFF DONALD KELLY**

TO THE HONORABLE SIM LAKE, UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, Donald Kelly, (Plaintiff), files this his Motion for Voluntary Dismissal of his suit without prejudice.

While a court's determination of a motion for voluntary dismissal under Rule 41(a)(2) is discretionary, it should generally be granted unless dismissal "will inflict clear legal prejudice on a defendant." *Conafay v. Wyeth Laboratories, Div. of American Home Products Corp.*, 841 F.2d 417, 419 (D.C. Cir. 1988). Here, there is no basis for a finding of prejudice that would prevent the voluntary dismissal of this action.

Plaintiff has indicated by way of the undersigned counsel that he no longer wishes to pursue his claim against Defendants. In concert with his desire to dismiss his claim Plaintiff Donald Kelly indicated that legal representation was no longer warranted. His intention was made known to Defendant Waffle House, Inc. in October

2014. Further, an unsuccessful attempt was made on behalf of Plaintiff Donald Kelly to dismiss his suit in February 2015 pursuant to Rule 41(a)(1)(A)(ii).

Plaintiff has not actively participated in this case since expressing his desire to nonsuit his claim. Further, as a point of emphasis, Plaintiff Donald Kelly has been wholly 'unavailable' in terms of his participation in matters concerning this litigation.

Counsel for Defendant Waffle House, Inc. has previously indicated on more than one occasion that he is opposed to a voluntary dismissal of Plaintiff Donald Kelly's claims because of Defendant's desire to depose Donald Kelly; however, to date Defendant has not served a notice of deposition for Donald Kelly.

For the foregoing reasons, Plaintiff Donald Kelly requests that this Motion for Voluntary Dismissal without prejudice be granted.

Respectfully submitted,

Rhonda J. Session,
Attorney and Counselor at Law, PC
11601 Shadow Creek Parkway, Suite 111-206
Pearland, Texas 77584
832.456.7967
866.458.4250 fax

By: /s/ Rhonda Session
Rhonda J. Session
rhondajsession@justice.com
Texas Bar No. 00791636
Federal ID No. 28294
Attorney for Plaintiffs

Certificate of Service

I certify that a true and correct copy of this document has been served on all attorneys of record and/or pro se litigants by U.S. certified mail, return receipt requested, by hand delivery, e-service or by electronic mail from the Clerk of this Court on this 3rd day of May, 2015.

Michael D. Williams
1177 West Loop South 10th Floor
Houston, Texas 77027
713.629.1580
713.629.5027 fax
mwilliams@brownsims.com
Counsel for Defendant Waffle House

/s/ Rhonda Session
Rhonda J. Session
Attorney for Plaintiffs

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ORDER

On this day came to be heard Plaintiff Donald Kelly's Motion for Voluntary Dismissal of his claim without prejudice. After considering the motion, Defendant Waffle House, Inc.'s response, and the arguments of counsel, if any, the Court finds that Plaintiff Donald Kelly's motion has merit and should be therefore GRANTED.

ACCORDINGLY, IT IS ORDERED that Plaintiff Donald Kelly's claim is dismissed without prejudice.

Signed on the ____ day of _____, 2015.

The Honorable Judge Sim Lake